From these results, we may summarize the following body of rules: an expelled member of a benefit society will be denied legal aid in the first instance, (1) always where the action was merely irregular, and (2) generally even where void, save where he seeks benefits. The final decision of the tribunal of the society (1) will be conclusive where damages or reinstatement are sought and no irregularity is alleged, but (2) has no greater effect than an arbitrator's decision where legal rights to benefits are asserted. The uncertainties remaining and the inconsistencies in the reasoning of the cases show that the law is still in the formative stage. It affords an interesting field in which the theoretical jurist may observe the interplay of ancient legal conceptions with modern ideas of policy and justice in the molding of rules to govern new relations.

R. M. L.

TORTS: LIABILITY OF CHARITABLE CORPORATIONS.—Is a charitable corporation liable for the negligent acts of its employees? This question was considered at length in *Stewart v. St. Helena Sanitarium,*[1] though what is said may be regarded as dictum, since the court found that the corporation involved was not a charitable one. There had been two earlier cases in which the defense was urged that a charitable corporation was not liable for the negligence of its servants, but in one of them the court based the decision on the fellow servant rule with a brief dictum as to the liability of charitable corporations,[2] and in the other, the corporation was found not to be a charity, as in the Stewart case.[3]

There have been a great many decisions in the American courts on this question, but neither the rules, nor the reasons for the rules are harmonious. The parent case in England on the whole subject declared that the corporation was not liable,[4] for "to give damages out of a trust fund would not be to apply it to those subjects which the author of the fund had in view, but would be to divert it to a completely different purpose." This appears to be the reason most frequently given by the American courts.[5] Some courts have qualified the rule with the priviso "if the benefactor has used due care in the selection of those

---

[1] (Jan. 9, 1918), 26 Cal. App. Dec. 116. Rehearing in the Supreme Court granted Feb. 28, 1918.

[2] Thomas v. German Society (1914), 168 Cal. 183, 141 Pac. 1186.

[3] Brown v. La Societe Francaise (1903), 138 Cal. 475, 71 Pac. 516.

[4] Feoffees of Heriot's Hospital v. Ross (1846), 12 Cl. & Finn. 507, 8 Eng. Rep. R. 1508.

[5] Downes v. Harper Hospital (1894), 101 Mich. 555, 60 N. W. 42; Perry v. House of Refuge (1884), 63 Md. 20, 52 Am. Rep. 495; Parks v. N. W. University (1905), 218 Ill. 381, 75 N. E. 991; Abston v. Waldron Academy (1909), 118 Tenn. 24, 102 S. W. 351; Fireman Ins. Board v. Boyd (1888), 120 Pa. St. 624, 15 Atl. 553; Whittaker v. St. Luke's Hospital (1909), 137 Mo. App. 116, 117 S. W. 1189.

servants,"[6] but base the qualified rule on the reason given above. But if the trust fund must not be diverted to pay damages, why should it be diverted if servants are carelessly selected? Is not that equally a diversion of the trust fund? Again, if this is the true reason for the non-liability of the charity, it should apply equally to injured beneficiaries and to injured third persons, for in each case the fund is not being used as the donor wished it to be used. Yet, though there are cases holding the charity not liable to a servant injured by defective machinery[7] or to an innocent pedestrian,[8] the great majority of courts refuse recovery only to beneficiaries, and allow third persons to recover.[9] Some courts advance another reason and put their decisions, wherever possible, on the ground that the corporation was a branch of the state and to apply the general doctrine of the non-suability of the state,[10] but this reason does not seem sound.[11]

A federal court, reviewing the English and American cases and carefully analyzing the facts, came to the conclusion that the true reason for the non-liability of the charitable corporation is this, that there is an implied contract between the beneficiary and the benefactor that the beneficiary will assume the risk of injury from the negligence of the benefactor's servants.[12] The reasoning thus advanced has been approved by several courts, some of them frankly receding from the theory on which they had based their earlier decisions.[13]

In Brown v. La Societe Francaise[14] the Supreme Court of California considered the question disputable but assumed it to be true for the purpose of argument, and then found the corporation not a charity; in Thomas v. German Society,[15] the same court declared the true rule to be "that where one accepts the benefit of a public or private charity, he exempts, by implied

[6] Hearns v. Waterbury Hospital (1895), 66 Conn. 98, 33 Atl. 595; Van Tassell v. Manhattan Hospital (1891), 15 N. Y. Supp. 620; Eighmy v. Union Pac. Ry. (1895), 93 Iowa 538, 61 N. W. 1056; Plant Relief etc. Depot v. Dickerson (1903), 118 Ga. 647, 45 S. E. 483.

[7] Whittaker v. St. Luke's Hospital, supra, n. 5.

[8] Fire Ins. Board v. Boyd, supra, n. 5.

[9] Bruce v. Central M. E. Church (1907), 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74; Kellog v. Church Charity Foundation (1908), 128 App. Div. 214, 112 N. Y. Supp. 566; Hewett v. Woman's Hospital Assoc. (1906), 73 N. H. 556, 64 Atl. 190; Hordern v. Salvation Army (1910), 199 N. Y. 233, 92 N. E. 626. See cases cited in Basabo v. Salvation Army (1912), 35 R. I. 22, 85 Atl. 120, 42 L. R. A. (N. S.) 1144.

[10] Benton v. Boston City Hospital (1885), 140 Mass. 13, 1 N. E. 836.

[11] See John M. Maguire "State Liability for Tort," 30 Harvard Law Review, 20.

[12] Powers v. Massachusetts Hospital (1901), 109 Fed. 294, 65 L. R. A. 372.

[13] Bruce v. Central M. E. Church, supra, n. 9; Kellog v. Church Charity Foundation, supra, n. 9. (This case was later reversed on another ground in 203 N. Y. 191, 96 N. E. 406). See also Hordern v. Salvation Army, supra, n. 9.

[14] Supra, n. 3.

[15] Supra, n. 2.

contract, the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants," but as the fellow-servant rule was applied this may be held purely a dictum.

In the principal case four propositions are laid down as sustained by the American courts, viz.: 1. That a trust fund cannot be taken to satisfy damages to a person suffering injury from the negligence of the trustees or servants. 2. That in no event may a beneficiary recover. 3. That a trustee or servant may be held personally liable. 4. The fact that certain patients may pay reasonable amounts does not necessarily deprive the hospital of its charitable character. The first of these propositions seems hardly to be correct, nor is the second universally true, and since the sanitarium was found to be clearly not a charity, the whole question must still be considered an open one in California.

E. B. P.

TRUSTS: RESCISSION OF CONVEYANCE FOR FAILURE OF CONSIDERATION.—A grantor cannot rescind his conveyance merely because of the grantee's failure to perform his promise.[1] Thus in executed sales, default in the payment of the purchase price gives the vendor no right to rescission and reconveyance.[2] The extraordinary remedy of cancellation and reconveyance[3] is applied is cases of fraud, mistake, and duress—the usual ground of equity jurisdiction.[4] It has, however, received an extension to cases where the grantee fails to perform his promise to support the grantor. In these cases, the reconveyance has been justified on the various grounds of condition subsequent,[5] fraud,[6] presumed fraud,[7] absence of other remedy,[8] and upon the arbitrary ground

---

[1] 6 Pomeroy, Equity Jurisprudence, § 686, p. 1157 and cases cited; Black, Rescission of Contracts, § 358; **Smith v. Blandin (1901), 133** Cal. 441, 444, 65 Pac. 894; Lawrence v. Gayetty (1889), 78 Cal. 126, 133, 20 Pac. 382; White v. Hendley (Nov. 12, 1917), 25 Cal. App. Dec. 757.

[2] Lassing v. James (1895), 107 Cal. 348, 357, 40 Pac. 534, 536; Blackwood v. Cutting Packing Co. (1888), 76 Cal. 212, 18 Pac. 248; Hoyt v. Hanbury (1888), 128 U. S. 584, 32 L. Ed. 565, 9 Sup. Ct. Rep. 176; Lowry v. Higgins (1854), 5 Ind. 507; Bearrow v. Wright (1897), 17 Tex. Cv. App. 641, 43 S. W. 902; Smith v. Blandin, supra, n. 1.

[3] Atlantic Delaine Co. v. James (1876), 94 U. S. 207, 24 L. Ed. 112; Union R. R. Co. v. Dull (1887), 124 U. S. 173, 31 L. Ed. 417, 8 Sup. Ct. **Rep. 433.**

[4] 2 Pomeroy, Equity Jurisprudence, §§ 910-912.

[5] Leach v. Leach (1853), 4 Ind. 628, 58 Am. Dec. 642; Cree v. Sherfy (1894), 138 Ind. 354, 37 N. E. 787; Mootz v. Petraschefski (1908), 137 Wis. 315, 118 N. W. 865.

[6] Hays v. Gloster (1891), 88 Cal. 560, 26 Pac. 367; Fabrice v. Von Der Brelie (1901), 190 Ill., 460, 60 N. E. 835.

[7] McClelland v. McClelland (1898), 176 Ill. 83, 51 N. E. 559; Cooper v. Gum (1894), 152 Ill. 471, 39 N. E. 267; Shephardson v. Stevens (1889), 77 Mich. 256, 43 N. W. 918.

[8] Glocke v. Glocke (1902), 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458; Cooper v. Gum, supra, n. 7.